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California Supreme Court Survey: A Review of Decisions: August 1988-October 1988

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California Supreme Court Survey
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The California Supreme Court Survey is a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of the issues that have been addressed by the supreme court, as well as to serve as a starting point for researching any of the topical areas. The decisions are analyzed in accordance with the importance of the court's holding and the extent to which the court expands or changes existing law. Attorney discipline and judicial misconduct cases have been omitted from the survey.

I. CIVIL PROCEDURE

Section 877.6(c) of the Civil Procedure Code protects a defendant who has entered into a good faith settlement from claims of non-settling tortfeasors for total equitable indemnity: **Far West Financial Co. v. D & S Inc.**

I. INTRODUCTION

In *Far West Financial Co. v. D. & S. Inc.*,[1] the supreme court upheld the court of appeal[2] holding that under section 877.6(c) of the Civil Procedure Code[3] any defendant who has entered into a good faith settlement will not be held liable for any claims for total equitable indemnity.[4] The court also rejected the defendant's assertion that such a holding would place an undue burden on nonsettling defendants seeking total equitable indemnity, since the interests of these as well as other defendants are protected by the statutory element of "good faith."[5]

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1972, Far West Financial Corporation[6] (Far West) contracted with D & S Company (D & S) as general contractor to build a condominium project. After a rainy winter, latent defects in the construction became evident. In response to these problems, the plaintiff filed suit against Far West, D & S and various subcontractors. After the suit was filed, Far West cross-complained for "complete indemnification from or partial contribution[7] from" D & S, since D & S was alleged to have had total control over the project.

Far West entered into a $315,000 settlement agreement with the plaintiff whereby the plaintiff released[8] Far West from any further liability. After the trial court found the settlement to be in good

1. 46 Cal. 3d 796, 760 P.2d 399, 251 Cal. Rptr. 202 (1988). Justice Arguelles wrote the majority opinion with Chief Justice Lucas and Justices Mosk, Broussard and Panelli concurring. Justice Kaufman and Justice Eagleson concurred and dissented in separate opinions.

2. Far West Fin. Corp. v. D & S Co., 200 Cal. App. 3d 969, 234 Cal. Rptr. 771 (1987).

3. CAL. CIV. PROC. CODE § 877.6(c) (West Supp. 1989).

4. *Far West*, 46 Cal. 3d at 817, 760 P.2d at 413, 251 Cal. Rptr. at 216; *see* 15 AM. JUR. 2D *Compromise and Release* § 23 (1974 & Supp. 1988); 14 CAL. JUR. 3D *Contribution and Indemnification* § 41 (1974 & Supp. 1988).

5. *Far West*, 46 Cal. 3d at 816, 760 P.2d at 412, 251 Cal. Rptr. at 215; *see* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 40 (8th ed. 1974); 12 CAL. JUR. 3D *Compromise, Settlement and Release* § 97 (1974 & Supp. 1988).

6. Far West Financial Corporation is a Delaware Corporation licensed to do business in California and finances and develops condominium projects.

7. *Far West*, 46 Cal. 3d at 801, 760 P.2d at 402, 251 Cal. Rptr. at 205; *see* 14 CAL. JUR. 3D *Contribution and Indemnification* §§ 1, 21 (1974 & Supp. 1988).

8. *See* 66 AM. JUR. 2D *Release* § 28 (1974 & Supp. 1988); 12 CAL. JUR. 3D *Compromise, Settlement and Release* § 70 (1974 & Supp. 1988).

faith, the trial court then dismissed all indemnity cross-complaints pending against Far West. Far West, however, continued its own cross-complaints for indemnity against the remaining defendants for the $315,000 it had paid to the plaintiff.

A few months later, D & S also entered into a settlement agreement with the plaintiff, whereby D & S agreed to pay $450,000 if the plaintiff released it from any further liability. After a good faith determination of the settlement, the trial court dismissed all cross-complaints filed against D & S, including Far West's. Far West appealed the dismissal of its cross-complaint contending that under section 877.6(c) a good faith settlement did not preclude its claim for total indemnity against D & S.

Noting a conflict in prior appellate decisions,[9] the court of appeal followed the decision reached by the majority of courts and held that under section 877.6(c), a good faith settlement claim by D & S barred Far West's claim for total equitable indemnity. The supreme court granted review.

III. THE STATUTE

California Civil Procedure Code section 877.6(c) states that when a tortfeasor and plaintiff enter into a settlement agreement "[a] determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor . . . from any further claims against the settling tortfeasor . . . for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault."[10]

Far West contended that since section 877.6(c) did not specifically address total indemnity claims it should not be interpreted to bar nonsettling defendants who are only vicariously liable from seeking a claim for total equitable indemnity from more culpable tortfeasors.[11] However, D & S asserted that the terms "equitable comparative contribution or partial or comparative indemnity" in section 877.6(c) should be interpreted broadly to include all claims sought under Cali-

9. *See* Horton v. Superior Court, 194 Cal. App. 3d 94, 224 Cal. Rptr. 467 (1987); IBM Corp. v. Carlson, 179 Cal. App. 3d 94, 224 Cal. Rptr. 438 (1986); Standard Pac. of San Diego v. A.A. Baxter Corp., 176 Cal. App. 3d 577, 222 Cal. Rptr. 106 (1986) (claim for total equitable indemnity is precluded by a good faith settlement); *but see* Angelus Assoc. v. Neonex Leisure Prod., Inc., 167 Cal. App. 3d 532, 213 Cal. Rptr. 403 (1985); Huisar v. Abex Corp., 156 Cal. App. 3d 534, 203 Cal. Rptr. 47 (1984) (claim for total equitable indemity survives a good faith settlement).

10. CAL. CIV. PROC. CODE § 877.6(c) (West 1988).

11. *Far West*, 46 Cal. 3d at 804, 760 P.2d at 403-04, 251 Cal. Rptr. at 206-07 (1988).

fornia's common law equitable indemnity doctrine.[12] Because the court decided that the statute was susceptible to either interpretation,[13] the court considered the statute's legislative history and background in order to ascertain which interpretation of the statute was the most appropriate.[14]

IV. THE MAJORITY OPINION

A. Background and Legislative History

The court noted that before 1975, California's common law equitable indemnity doctrine allowed one tortfeasor, in some circumstances, to completely shift its liability to a more responsible tortfeasor.[15] After *Li v. Yellow Cab*[16] adopted the principle of comparative negligence, the question of how to apply the then-existing equitable indemnity doctrine still remained.[17] In response to this concern, *American Motorcycle Association v. Superior Court*[18] held that "the existing California common law equitable indemnity doctrine . . . suffers from the same basic 'all or nothing' deficiency as the discarded contributory negligence doctrine and falls considerably short of fulfilling *Li*'s goal of 'a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.' "[19] As a result, *American Motorcycle* modified California's equitable indemnity doctrine to allow partial indemnity on a comparative fault basis.[20]

In addition, *American Motorcycle* dealt with the issue of how a tortfeasor's claim for partial or comparative indemnity would be affected when a defendant against whom indemnity was sought settled with the plaintiff.[21] The court said "[f]ew things would be better calculated to frustrate [section 877's] policy, and to discourage settlement of disputed tort claims, than knowledge that such a settlement lacked finality and would lead to further litigation with one's joint

12. *Id.* at 804, 760 P.2d at 404, 251 Cal. Rptr. at 207.

13. *Id.*; *see also* 58 CAL. JUR. 3D *Statutes* § 86 (1980).

14. *Far West*, 46 Cal. 3d at 804, 760 P.2d at 404, 251 Cal. Rptr. at 207; *see* 58 CAL. JUR. 3D *Statutes* § 88 (1980).

15. *Far West*, 46 Cal. 3d at 805, 760 P.2d at 404, 251 Cal. Rptr. at 207.

16. 13 Cal. 3d 804, 812-13, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858, 864 (1975). The supreme court held in *Li* that the doctrine of contributory negligence would be vacated and the doctrine of comparative negligence would be adopted. Under comparative negligence, liability between the parties was ascertained in proportion to their own negligence. *Id.*

17. *Far West*, 46 Cal. 3d at 805, 760 P.2d at 404, 251 Cal. Rptr. at 207.

18. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

19. *Far West*, 46 Cal. 3d at 805, 760 P.2d at 404, 251 Cal. Rptr. at 208 (citing *American Motorcycle*, 20 Cal. 3d at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190.)

20. *Far West*, 46 Cal. 3d at 805, 760 P.2d at 405, 251 Cal. Rptr. at 208 (citing *American Motorcycle*, 20 Cal. 3d at 598, 578 P.2d at 912, 146 Cal. Rptr. at 195.)

21. *Id.*

tortfeasors, and perhaps further liability."[22] Accordingly, the court in the instant case held that *American Motorcycle* stood for the proposition that a defendant who entered into a good faith settlement with the plaintiff would be free from any partial or comparative indemnity claim.[23]

Although the language in *American Motorcycle* was unambiguous, the court noted that there was some confusion regarding whether *American Motorcycle* had created a new indemnity doctrine completely separate from the preexisting total equitable indemnity doctrine.[24] The court stated that this question was answered by *People ex rel. Department of Transportation v. Superior Court*[25] which held that "*American Motorcycle* did not establish a new cause of action separate and distinct from the traditional equitable indemnity action, but simply modified the all-or-nothing aspects of the pre-*American Motorcycle* doctrine to permit partial indemnification in appropriate cases."[26]

Shortly after *People ex rel. Department of Transportation*, the court stated that the Legislature enacted section 877.6 of the Civil Procedure Code[27] which, in effect, codified *American Motorcycle*.[28] The court concluded that since section 877.6 followed the holding in *American Motorcycle*, and since *People ex rel. Department of Transportation* had made it clear that *American Motorcycle* had not created two separate equitable doctrines, but one comparative indemnity doctrine, it was reasonable to interpret section 877.6(c)'s reference to "partial or comparative indemnity" to include the entire range of equitable indemnity claims.[29]

B. Purpose

The court stated that the purpose of section 877.6(c) was to further two separate objectives: "[1] the encouragement of settlement and [2] the equitable allocation of costs among multiple tortfeasors." Both

22. *Id.* at 806, 760 P.2d at 405, 251 Cal. Rptr. at 208 (citing *American Motorcycle*, 20 Cal. 3d at 604, 578 P.2d at 915-16, 146 Cal. Rptr. at 198-99, quoting *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 236, 132 Cal. Rptr. 843, 846 (1976)).

23. *Id.*, at 806, 760 P.2d at 405, 251 Cal. Rptr. at 208.

24. *Id.* at 807, 760 P.2d at 406, 251 Cal. Rptr. at 209.

25. 26 Cal. 3d 744, 756-57, 608 P.2d 673, 681, 163 Cal. Rptr. 585, 593 (1980).

26. *Far West*, 46 Cal. 3d at 808, 760 P.2d at 406, 251 Cal. Rptr. at 209-10 (citing *People ex rel. Dep't of Transp.*, 26 Cal. 3d at 756-57, 608 P.2d at 681, 163 Cal. Rptr. at 593.

27. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1989).

28. *Far West*, 46 Cal. 3d at 808-09, 760 P.2d at 407, 251 Cal. Rptr. at 210.

29. *Id.* at 809, 760 P.2d at 407-08, 251 Cal. Rptr. at 210-11.

these objectives could only be achieved by including claims for total equitable indemnity within the meaning of section 877.6(c).[30]

The court recognized that the policy of encouraging settlements would be severely undermined if a tortfeasor who had completed a good faith settlement with the plaintiff would still be liable for total equitable indemnity.[31] The court realized, therefore, that any interpretation of section 877.6(c) which excluded total equitable indemnity "would create a substantial obstacle to settlement in cases in which a defendant who is contemplating settlement is faced with a claim for total indemnity."[32]

The court also disagreed with the plaintiff's argument that a total indemnity claim must not be barred under section 877.6(c) if the equitable allocation of costs among multiple tortfeasors was to be achieved.[33] The court stated that this proposition did not take into account the fact that under section 877.6(c), a trial court considers whether the amount paid in settlement bears a reasonable relationship to the tortfeasor's proportionate share of liability. The court stated that "the nonsettling defendants' liability to the plaintiff will be reduced by a sum that is not 'grossly disproportionate' to the settling defendant's share of liability, thus providing at least some rough measure of fair apportionment of loss between the settling and nonsettling defendants."[34]

The court said that under this good faith requirement under section 877.6(c), derivatively liable tortfeasors, such as Far West, who had already settled with the plaintiff but had retained their indemnity claim could still challenge the subsequent settlement of a more culpable defendant.[35] If the trial court found that the settlement was not within the range of the more culpable tortfeasor's proportionate liability, thereby leaving the vicariously liable defendant to bear more than its share of the loss, the good faith holding would be withdrawn. The less culpable tortfeasor could then continue with the equitable liability claim, thereby protecting his interests.[36]

After taking the judicial background, legislative history and statutory purpose of section 877.6(c) into account, the majority concluded

30. *Id.* at 810, 760 P.2d at 408, 251 Cal. Rptr. at 211 (citing Abbott Ford Inc. v. Superior Court, 43 Cal. 3d 855, 872, 741 P.2d 124, 133, 239 Cal. Rptr. 626, 635 (1988)); *see also* 15 AM. JUR. 2D *Compromise and Settlement* § 5 (1976 & Supp. 1988); Cal. Practicum, *California Code of Civil Procedure Sections 877, 877.5 and 877.6: The Settlement Game in the Ballpark that Tech-Bilt*, 13 PEPPERDINE L. REV. 823 (1985).

31. *Far West*, 46 Cal. 3d at 810, 760 P.2d at 408, 251 Cal. Rptr. at 211-12 (1988); *see supra* note 21.

32. *Far West*, 46 Cal. 3d at 811, 760 P.2d at 409, 251 Cal. Rptr. at 212.

33. *Id.* at 814, 760 P.2d at 411, 251 Cal. Rptr. at 214.

34. *Id.* at 815, 760 P.2d at 412, 251 Cal. Rptr. at 215 (quoting *Abbott Ford*, 43 Cal. 3d at 874, 741 P.2d at 134, 239 Cal. Rptr. at 646).

35. *Id.*

36. *Id.*

that under subdivision (c) "a tortfeasor defendant who has entered into a good faith settlement within the meaning of . . . [subdivision (c)] is absolved of any further liability for all equitable indemnity claims including claims seeking total equitable indemnity."[37]

V. THE SEPARATE OPINIONS

A. Justice Kaufman's Concurring and Dissenting Opinion

Justice Kaufman agreed with the majority's opinion that a good faith settlement under section 877.6(c) precludes a claim based on partial or comparative fault.[38] Justice Kaufman, however, took issue with the majority's view that a claim based on vicarious liability was also barred by section 877.6(c).[39] He reasoned that since vicarious liability was different from fault-based forms of tort liability, that a claim for indemnity based on vicarious liability was not based on comparative fault and therefore was not within the meaning of section 877.6(c).[40] He concluded with the observation that not only was the majority's holding unauthorized by law, but also patently unfair.[41]

B. Justice Eagleson's Concurring and Dissenting Opinion

Justice Eagleson concurred and dissented with the majority's opinion for the same reasons stated by Justice Kaufman.[42] He wrote a separate opinion, however, to emphasize the basic unfairness of the majority's holding requireing a vicariously liable defendant to pay for some of the plaintiff's damages, while precluding him from collecting against the tortfeasor whose actions made the vicariously liable defendant liable.[43]

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37. *Far West*, 46 Cal. 3d at 817, 760 P.2d at 413, 251 Cal. Rptr. at 216.

38. *Id.* at 817-18, 760 P.2d at 413-14, 251 Cal. Rptr. at 217 (Kaufman, J., concurring and dissenting).

39. *Id.* at 817, 760 P.2d at 414, 251 Cal. Rptr. at 217 (Kaufman, J., concurring and dissenting).

40. *Id.* at 818-19, 760 P.2d at 414, 251 Cal. Rptr. at 217-18 (Kaufman, J., concurring and dissenting).

41. *Id.* at 828, 760 P.2d at 421, 251 Cal. Rptr. at 224 (Kaufman, J., concurring and dissenting).

42. *Id.* (Eagleson, J., concurring and dissenting).

43. *Id.* at 829-30, 760 P.2d at 421-22, 251 Cal. Rptr. at 225-26 (Eagleson, J., concurring and dissenting).

VI. CONCLUSION

By giving a broad interpretation to section 877.6(c), the court in *Far West* has placed policy over equity. Unless defendants choose to challenge a "good faith" determination, they have reapportioned the payment of a plaintiff's damages from a tortfeasor, who is at least negligently and possibly intentionally liable, to a defendant whose liability is based upon another person's actions. By shifting the burden of payment under this set of facts, the court's holding, in effect, unjustly enriches the culpable tortfeasor, whose actions brought the parties into the lawsuit in the first place, at the expense of the vicariously liable defendant.

DANIEL RHODES

II. CONSTITUTIONAL LAW

Ineffective assistance of counsel is proven if: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defense: **In re Cordero.**

In *In re Cordero*, 46 Cal. 3d 161, 756 P.2d 1370, 249 Cal. Rptr. 342 (1988), the supreme court held that in order for a writ of habeas corpus to succeed, the petitioner must satisfy a two-prong test. First, petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness in light of prevailing professional norms. Second, petitioner must prove that counsel's deficient performance prejudiced the defense. Both may be satisifed by showing that counsel conducted an inadequate investigation. *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 373 (1963 & Supp. 1985); Comment, *Ineffective Assistance of Counsel in Criminal Cases: An Overview of Current Trends in Oregon and the Ninth Circuit*, 14 WILLAMETTE L. REV. 443 (1978).

In re Cordero involved a petition for habeas corpus based upon ineffective assistance of counsel. At petitioner's first degree murder trial, the prosecution produced eleven witnesses who placed petitioner at the scene of the crime and brought forward two witnesses who testified that petitioner was the victim's killer. Petitioner's counsel attempted to argue an intoxication defense to reduce the first degree murder charges to involuntary manslaughter. His counsel, however, failed to give an opening statement, introduced no evidence supporting his intoxication defense theory, neglected to explore differences between accounts of various eyewitnesses for the prosecution, and did not object to the prosecution's admission into evidence of a tape-recorded statement petitioner made to the police. Peti-

tioner claimed that these insufficiencies directly resulted in his conviction of first degree murder instead of a lesser charge.

The supreme court appointed a referee to make findings and conclusions regarding the petitioner's contentions. *See* CAL. CIV. PROC. CODE § 640 (West 1981 & Supp. 1989) (appointment of referees); B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Proceedings Without Trial* §§ 49-51 (3d ed. 1985 & Supp. 1988); 55 CAL. JUR. 3D *Referees* §§ 7-9 (1980 & Supp. 1988). With respect to the factual investigation of the case, the referee concluded that defense counsel's performance was deficient based on the following facts: Counsel conducted only three twenty-minute interviews with the petitioner prior to trial, two of which were not conducted in privacy; counsel did not personally interview any of the possible witnesses; and counsel failed to pursue the leads and evidence made available to him, especially evidence suggesting that petitioner ingested drugs and alcohol prior to the killing.

The referee found counsel's conduct fell below an objective standard of reasonableness. The referee also concluded that a more favorable outcome would have resulted had counsel not deprived petitioner of a meritorious defense. The supreme court upheld the referee's conclusions and thus legitimized the two-prong test for determining assistance of counsel. *See* 19 CAL. JUR. 3D *Criminal Law* § 2170 (1984 & Supp. 1988). *See generally* 19 CAL. JUR. 3D *Criminal Law* § 2169 (1984 & Supp. 1988); 21A AM JUR. 2D *Appeal and Error* § 648, 778 (1981 & Supp. 1988). The supreme court stated that inadequate investigation is a breach of the effective assistance of counsel standard.

By increasing a petitioner's arsenal of potential appellate claims, the supreme court has eased the burden on convicted parties seeking writs of habeas corpus. The court, by recognizing inadequate factual investigation as grounds for a claim of ineffective assistance of counsel, opened yet another avenue of appeal for the convicted to explore. As it now stands, a petitioner does not have to show that trial counsel's conduct more likely than not altered the outcome of the case. One need only show that because of counsel's conduct, there exists a probability of inadequate representation sufficient enough to undermine confidence in the outcome. The confusion this nebulous standard will create in the judicial system may prove unmanageable. The various interpretations likely to evolve from this standard as well as

the backlog of cases resulting from such lack of uniformity do not justify its adoption.

JOHN AUGUSTINE SOPUCH III

III. CORPORATIONS

Section 2011 of the Corporations Code prohibits creditors of a dissolved corporation from pursuing former shareholders for post-dissolution claims under the equitable "trust fund" theory: **Pacific Scene v. Penasquitos, Inc.**

In *Pacific Scene, Inc. v. Penasquitos, Inc.*, 46 Cal. 3d 407, 758 P.2d 1182, 250 Cal. Rptr. 651 (1988), the court held that creditors of dissolved corporations cannot sue former shareholders for claims arising after dissolution. Although the equitable trust fund theory has been utilized by creditors to accomplish this result in the past, the court maintained that equitable common law remedies are preempted where the legislature has indicated a desire to replace such actions with statutory equivalents. *See* 1A BALANTINE & STERLING, CALIFORNIA CORPORATION LAWS ch. 15, § 317.04 (4th ed. 1988); Wallach, *Products Liability: A Remedy in Search of a Defendant—The Effect of a Sale of Assets and Subsequent Dissolution on Product Dissatisfaction Claims*, 41 MO. L. REV. 321, 323-35 (1976); *see generally* 19 AM. JUR. 2D *Corporations* §§ 2829-2830 (1986 & Supp. 1988); 30 CAL. JUR. 3D *Equity* § 5 (1987); Henn & Alexander, *Effect of Corporate Dissolution on Products Liability Claims*, 56 CORNELL L. REV. 865 (1971); Annotation, *Availability of and Time for Bringing Action Against Former Director, Officer, or Stockholder in Dissolved Corporation for Personal Injuries Incurred after Final Dissoluation*, 20 A.L.R. 4TH 414 (1983 & Supp. 1988).

Penasquitos, Inc., (Penasquitos) was a corporation engaged in land development activities. In 1975, Pacific Scene, Inc. (Pacific) obtained graded lots from Penasquitos upon which Pacific constructed residential units. In 1982, several purchasers of these units discovered material defects in their homes allegedly caused by improper preparation of the soil and subsequently sued Pacific. Because Penasquitos was dissolved in 1979, Pacific attempted to cross-complain against the former shareholders, asking the court to impose an equitable trust over the distributions these shareholders received.

The equitable trust fund theory was originally approved by the court in order to allow creditors to circumvent the common law rule regarding corporate dissolutions. Prior to its adoption, distribution of a dissolved corporation's assets terminated a creditor's ability to satisfy outstanding claims against the corporation. Thus, creditors were

allowed to sue former shareholders on the theory that the distributions these persons received were held in trust for deserving creditors of the former corporation. *See Crossman v. Vivenda Water Co.*, 150 Cal. 575, 89 P. 335 (1907).

In considering corporate dissolutions, the legislature initially granted creditors a direct remedy against shareholders. However, the legislature subsequently amended the law to allow direct actions against former shareholders by "the corporation, or by its receiver, liquidator, or trustee in bankruptcy." 1933 Cal. Stat. ch. 533 (codified as section 402 of the Civil Code in 1933, recodified as section 5012 of the Corporations Code in 1947). The trust fund theory was therefore held to be the only method whereby creditors could directly sue former shareholders of a dissolved corporation. *See Zinn v. Bright*, 9 Cal. App. 3d 188, 192-93, 87 Cal. Rptr. 736, 739-40 (1970).

After reviewing the historical rights of creditors of dissolved corporations, the court next considered how these rights were affected by the 1977 revisions to the Corporations Code. One of these revisions restored the right to creditors to sue former shareholders directly. *See* CAL. CORP. CODE § 2009 (West 1977 & Supp. 1989). Another revision allowed suits against former shareholders "in the corporate name." *See* CAL. CORP. CODE § 2011(a) (West 1977 & Supp. 1989). Because this scheme was detailed, thorough, and included remedies formerly available only in equity, the court reasoned that the legislature intended to preempt other common law remedies not articulated under the statutory scheme. *See* 30 CAL. JUR. 3D *Equity* § 5 (1987). To support its holding, the court also reviewed several cases which were in accord. *See, e.g., United States v. Oil Resources, Inc.*, 817 F.2d 1429 (9th Cir. 1987) (interpreting California law); *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547 (Tex. 1981).

The court then discussed the effect of a specific provision, section 2011(a) of the Corporations Code. This section permits creditors to sue shareholders "in the corporate name . . . upon any cause of action against the corporation arising *prior to its dissolution*." CAL. CORP. CODE § 2011(a) (West 1977 & Supp. 1989) (emphasis added). The court reasoned that by using the phrase "prior to its dissolution," the legislature intended to eliminate post-dissolution claims. This holding was compelled, the court believed, by several factors.

First, the court assumed that the legislature was aware of the equitable trust doctrine as a remedy for corporate creditors. The court could find no reason why the legislature would enact section 2011(a) unless it intended to modify the scope of the remedies previously

available. Next, the court indicated that the statute amended by section 2011(a) contained no provision limiting actions to pre-dissolution claims. The court reasoned that the legislature would not add language specifically allowing pre-dissolution actions when it could have retained the language allowing all claims, regardless of when they arose. By using the specific language, the legislature must have intended to forbid post-dissolution actions.

The court further stated that if the legislature had wished to recognize post-dissolution remedies, it would have been pointless to grant a statutory remedy to pre-dissolution claimants while leaving the post-dissolution claimants to the more burdensome requirements of equity. The court acknowledged the absence of legislative history, but argued this bifurcated approach to justice was illogical and weighed heavily against allowing post-dissolution claims.

Finally, the court considered two major but competing policies in the area of corporate dissolutions: first, to provide finality; second, to protect creditors' rights. The court argued, however, that by allowing post-dissolution claims, the balance would be unfairly tilted in favor of creditors' rights and against finality. Although section 2011 included a caveat which asserts that it is a procedural section only, the court maintained that this statement was ambiguous, and was therefore of no value in resolving the question in issue. Rather, the court relied upon the language of the statute and the policy of finality to support its decision. Notably, the court refused to extend its holding to cases where a corporation dissolves and distributes its assets to perpetrate a fraud on its creditors.

By limiting the remedies available to post-dissolution claimants, the court has taken another step away from its previous role as an active protector of consumer rights. A major group of creditors affected by the removal of the equitable trust from a plaintiff's arsenal are persons harmed by defective products. *See* Note, *Continuing Corporate Existence for Post-Dissolution Claims: The Defective Products Dilemma*, 13 PAC. L.J. 1227 (1982). Given the court's holding, a corporation which sells a defective product can, after dissolution, be free from liability arising from damages the product may inflict. Although the court specifically rejected this approach when the corporation is aware of the defect, the result in remaining cases may nonetheless appear unjust. However, the court properly interpreted the applicable law, thereby leaving any statutory modifications in legislative hands.

MARK G. KISICKI

IV. CRIMINAL PROCEDURE

A. *Section 647(d) of the Penal Code which prohibits loitering near public restrooms for the purpose of committing lewd acts is not unconstitutionally vague*: **People v. Superior Court (Caswell).**

In *People v. Superior Court (Caswell)*, 46 Cal. 3d 381, 758 P.2d 1046, 250 Cal. Rptr. 515 (1988), the court evaluated a constitutional challenge to section 647(d) of the Penal Code which makes it a misdemeanor to loiter near public toilets "for the purpose of engaging in or soliciting any lewd . . . act." CAL. PENAL CODE § 647(d) (West 1989). *See* 77 AM. JUR. 2D *Vagrancy* §§ 17-19 (1975 & Supp. 1988); 19 CAL. JUR. 3D *Criminal Law* § 1957 (1984 & Supp. 1988). In upholding its constitutionality, the court found the statute's language specific enough to provide citizens with sufficient notice of the scope of the law. The court rejected the defendant's concerns regarding inconsistent, unjustified and arbitrary enforcement. The majority thus reversed a 1985 appellate court decision which found the same section unconstitutional on vagueness grounds. *See People v. Soto*, 171 Cal. App. 3d 1158, 217 Cal. Rptr. 795 (1985).

The defendants were sixteen homosexual males accused of violating section 647(d). Relying on *Soto*, they asserted that the law as applied was unconstitutionally vague and violative of their due process rights. The defendants argued that the subjective nature of the statute allowed police officers complete freedom to arrest citizens based on insufficient probable cause. *See Soto*, 171 Cal. App. 3d at 1166, 217 Cal. Rptr. at 800; *see generally* Note, *Pryor v. Municipal Court: California's Narrowing Definition of Solicitation for Public Lewd Conduct*, 32 HASTINGS L.J. 461 (1980).

The court applied a two-prong test in its analysis of the vagueness challenge. First, it examined whether the statutory language gave fair notice to ordinary citizens of the specific conduct prohibited by section 647(d). Finding sufficient notice, the court emphasized the unambiguous existence within the statute itself of the standard of intent required for violation; namely, whether it was the loiterer's purpose to "engag[e] in or solicit any lewd or lascivious or any unlawful act." CAL. PENAL CODE § 647(d) (West 1988). The clear presence of this "specific intent requirement" was critical to the courts rejection of the vagueness challenge. *See Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982). Further, the court noted that reasonable persons would not find the statutory phrases "loiter," "in

or about any toilet open to the public," or "lewd or lascivious . . . act" indefinite or misleading. *Caswell*, 46 Cal. 3d at 391, 758 P. 2d at 1050, 250 Cal. Rptr. at 519.

Under the second prong, the court analyzed whether section 647(d) provided police officers with adequate criteria to effectuate nondiscriminatory arrests. The defendants contended that section 647(d) allows police to harass and arrest based solely on personal bias—that is, the law requires police to look into the mind of the suspect and ascertain mens rea before any overt criminal act takes place. The court rejected this argument stressing both the intent requirement and the location limitation explicit within section 647(d). Police officers may only arrest citizens whose "*conduct* gives rise to probable cause to believe that . . . [they are] loitering in or about a *public restroom* with the proscribed *illicit intent.*" *Caswell*, 46 Cal. 3d at 394, 758 P.2d at 1052, 250 Cal. Rptr. at 521 (emphasis added). This narrowness of the statute was seen by the court as distinguishing section 647(d) from other vagrancy statutes that have been overturned for vagueness. *See, e.g., Kolender v. Lawson*, 461 U.S. 352 (1983). Moreover, the court emphasized that sufficient probable cause for arrest under section 647(d) would be easily ascertainable by the police through the use of, *inter alia*, informants, citizen complaints, and personal recognition of certain repeat offenders.

Noting that the law may properly punish the same culpable conduct through different methods, the court rejected the argument in *Soto* that separate criminal laws covering illegal solicitation rendered section 647(d) superfluous. *See Soto*, 171 Cal. App. 3d at 1168, 217 Cal. Rptr. at 801.

Lastly, the court cited opinions from other jurisdictions rejecting vagueness challenges to laws generally analogous to section 647(d). *See, e.g., Lambert v. City of Atlanta*, 242 Ga. 645, 250 S.E.2d 456 (1978); *People v. Pagnotta*, 25 N.Y.2d 333, 253 N.E.2d 202, 305 N.Y.S.2d 484 (1969).

There exists a concern that vagrancy statutes are misued by law enforcement as vehicles for cleaning public areas of those deemed socially undesirable. *See* Comment, *California Penal Code Section 647(e): A Constitutional Analysis of the Law of Vagrancy*, 32 HASTINGS L.J. 285 (1980); Comment, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782 (1968). The court's holding in *Caswell* does nothing to dispel this genuine concern. Police officers may now legitimately effectuate section 647(d) arrests based on speculative conjecture into the mind of the accused, and absent any overt criminal act. The majority opinion clearly articulated the requirement that sexual preference alone is an insufficient basis for arrest under section 647(d). However, the holding in this case will inevitably gen-

erate increased harassment of homosexuals under the guise of protecting the public from crime. Without additional overt acts, section 647(d) violations should not be considered crimes, but merely fantasies in the minds of those arrested. *See generally* Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV. 643 (1966).

MARGARET LISA WILSON

B. *Both a statute allowing a district attorney to approve conditions of diversion programs, and a local rule precluding misdemeanor diversion for defendants charged with felonies are constitutional:* **Davis v. Municipal Court.**

In *Davis v. Municipal Court*, 46 Cal. 3d 64, 757 P.2d 11, 249 Cal. Rptr. 300 (1988), the supreme court held section 1001.2(b) of the Penal Code which allows a local district attorney to approve the conditions of local diversion programs, was constitutional. *See* CAL. PENAL CODE § 1001.2(b) (West 1985). The court also found a local rule precluding misdemeanor diversion for defendants charged with felony wobbler offenses not to be in violation of the separation of powers doctrine or the equal protection doctrine.

The defendant was charged with prostitution, a misdemeanor, and with grand theft—a wobbler offense which can be charged as either a misdemeanor or felony. *See* CAL. PENAL CODE § 647(b) (West 1988) (prostitution); CAL. PENAL CODE § 487(1) (West 1985) (grand theft); CAL. PENAL CODE § 17(b) (West 1985) (misdemeanor classifications). The district attorney charged the grand theft as a felony, but the municipal court later reduced it to a misdemeanor. *See* CAL. PENAL CODE 17(b)(5) (West 1985). The defendant sought placement in a local misdemeanor diversion program. However, a rule in the program barred anyone charged with a felony wobbler from eligibility for diversion. *See* CAL. PENAL CODE §§ 1001-1001.9 (West 1985 & Supp. 1989). The court of appeal held that section 1001.2(b) was unconstitutional because it subjected local diversion programs to the approval of the local district attorney which was an overreaching delegation of legislative power to the executive branch.

Section 1001.2(b) states: "No person shall be diverted under a program unless it has been approved by the district attorney." CAL. PENAL CODE § 1001.2(b) (West 1985). The supreme court held that the

legislature had not intended subdivision (b) to force a statewide diversion program on local courts. Rather, the legislature intended that local officials decide wheter to implement diversion programs and gave them the authority to construct programs reflecting local needs.

The court determined that allowing district attorneys to veto diversion programs was not an unconstitutional delegation of legislative authority to an executive official. The court explained that the separation of powers doctrine does not require rigid classification of the activities of government, but allows each branch of government to exercise all three kinds of power. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2:2 (2d ed. 1978). Although the legislature itself could disapprove of diversion programs, this "quasi-legislative" decision could properly be given to members of the executive branch. *See generally Parker v. Riley*, 18 Cal. 2d 83, 89-90, 113 P.2d 873, 877 (1941).

The court also noted that a district attorney has historically possessed the discretion to prosecute or dismiss charges against a defendant. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). *See generally* Annotation, *Pretrial Diversion: Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant's Consent to Non-Criminal Alternative*, 4 A.L.R. 4TH 147, 151 (1981 & Supp. 1988). Therefore, the legislature recognized that diversion programs were closely related to the district attorney's executive authority over the prosecutorial process and determined that diversion programs should not be allowed without the district attorney's approval. *See* 63A AM. JUR. 2D *Prosecuting Attorneys* §§ 23-29 (1984 & Supp. 1988); 20 CAL. JUR. 3D *Criminal Law* §§ 2356-2361 (1985); The defendant contended, in the alternative, that even if the district attorney had the proper authority to approve or disapprove the local diversion program, the local rule at issue was an unconstitutional violation of the equal protection clause and separation of powers doctrine. The defendant alleged that a rule which made a defendant's diversion eligibility dependent on the prosecutor's decision to charge a wobbler as either a misdemeanor or felony allowed the executive branch to infringe on judicial power.

Although a statute giving a prosecutor the right to veto a judicial decision after charges had been filed would be unconstitutional, the rule at issue here gave the district attorney discretion to decide what charges ought to be prosecuted before any charges were filed. The court found no authority to suggest that such traditional prosecutorial discretion was in violation of the separation of powers doctrine. The court therefore held that the decision to charge a wobbler as a felony instead of a misdemeanor was clearly within the

prosecutor's province and in no way infringed upon the exercise of judicial function. *See People v. Adams*, 43 Cal. App. 3d 697, 707, 117 Cal. Rptr. 905, 911 (1974).

Finally, the court rejected defendant's claim that the local wobbler rule violated the equal protection doctrine because it treated defendants differently based upon whether the prosecutor charged them with a felony or a misdemeanor. The court stated that if there was enough probable cause to charge a defendant with a felony, the defendant could not claim denial of equal protection. *See* 13 CAL. JUR. 3D *Constitutional Law* § 340 (1974 & Supp. 1988) (mere possibility that similar cases will be treated differently does not amount to an equal protection violation.)

The *Davis* holding does not constitute a new rule of law, but simply validates the local prosecuting attorney's authority to approve of diversion programs. This ruling ensures that the state's numerous misdemeanor diversion programs can continue to expedite charges against less serious offenders in a manner that is both beneficial to the state and the defendant.

DANIEL RHODES

C. *Pandering under Penal Code section 266i does not include the hiring and paying of actors to perform sexually explicit acts in a non-obscene "adult" motion picture:* **People v. Freeman.**

In *People v. Freeman*, 46 Cal. 3d 419, 758 P.2d 1128, 250 Cal. Rptr. 598 (1988), the court held that section 266i of the Penal Code does not apply to a director who hired and paid actors to perform sexually explicit acts in a non-obscene "adult" film, but did not pay the actors "for the purpose of sexual arousal or gratification." *Freeman*, 46 Cal. 3d at 424-25, 758 P.2d at 1133, 250 Cal. Rptr. at 603. The court concluded that to make section 266i applicable to the defendant director's conduct "would unlawfully impinge upon protected First Amendment rights." *Id.* at 424, 758 P.2d at 1133, 250 Cal. Rptr. at 603; *see* U.S. CONST. amend. I; *see generally* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 231-232, 237, 316, 326 (1988); 16 AM. JUR. 2D *Constitutional Law* § 501 (1984); 13 CAL. JUR. 3D *Constitutional Law* §§ 242-243 (1984 & Supp. 1988); *cf.* CAL. CONST. art. I, § 2(a).

The defendant director was convicted of pandering, that is "procur[ing] another person for the purposes of prostitution." CAL.

PENAL CODE § 266i (a) (West 1988). *See generally* 63A AM. JUR. 2D *Prostitution* §§ 15-30 (1984); 73 C.J.S. *Prostitution and Related Offenses* 8-20 (1983); 17 CAL. JUR. 3D *Criminal Law* §§ 875-879 (1984 & Supp. 1988). He had hired the actors to perform sexually explicit acts in a film he was producing and directing. The filming was not open to the public. The defendant was not charged with any obscenity law violations. *See* CAL. PENAL CODE § 311 (West Supp. 1989).

The court noted that because the film had not been found to be obscene, "the prosecution of defendant under the pandering statute must be viewed as a somewhat transparent attempt at an 'end run' around the First Amendment and the state obscenity laws." *Freeman*, 46 Cal. 3d at 423, 758 P.2d at 1133, 250 Cal. Rptr. at 603. *See generally* Comment, *New Prosecutorial Techniques and Continued Judicial Vagueness: An Argument for Abandoning Obscenity as a Legal Concept*, 21 UCLA L. REV. 181, 213-40 (1973) The court addressed the People's argument that since the actors had performed sexual acts for money, they were prostitutes, thereby making the director who paid and hired them a panderer under section 266i. The court rejected this argument by pointing out that "prostitution" under section 647 of the Penal Code requires a "lewd act," which in turn requires sexual contact between the prostitute and the paying customer "for the purpose of *sexual arousal or gratification of the customer or the prostitute*." *Freeman*, 46 Cal. 3d at 424, 758 P.2d at 1134, 250 Cal. Rptr. at 604 (quoting *People v. Hill*, 103 Cal. App. 3d 525, 534-35, 163 Cal. Rptr. 99, 109 (1980) (emphasis in original)). The court held the defendant neither elicited the requisite conduct nor emitted the requisite mens rea under section 266i.

Although the defendant's conduct fell outside the scope of section 266i, the court nevertheless addressed the statute's possible first amendment infringement. The court noted its duty to consider the legislative intent regarding the statute and, in turn, the presumption that the legislature would not intend unconstitutional results. *See* 58 CAL. JUR. 3D *Statutes* § 90 (1984). Further, the court stressed that non-obscene motion pictures, including defendant's, fall within the ambit of first amendment protection. *See, e.g., Barrows v. Municipal Court*, 1 Cal. 3d 821, 824, 464 P.2d 483, 486, 83 Cal. Rptr. 819, 822 (1970); *see generally* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 237 (1988); 13 CAL. JUR. 3D *Constitutional Law* § 242-43 (1984 & Supp. 1988). The court concluded the legislature did not intend section 266i to apply to the payment and hiring of actors and actresses in nonobscene motion pictures.

The court disapproved of appellate decisions which held that performance of sexual acts by paid actors or models by itself constituted prostitution for the purposes of section 266i. *See, e.g., People v.*

Fixler, 56 Cal. App. 3d 321, 128 Cal. Rptr. 363 (1976). Nevertheless, the court maintained that it would be unlawful to commit "crimes independent of and totally apart from any payment for the right to photograph the conduct." *Freeman*, 46 Cal. 3d at 429, 758 P.2d at 1138, 250 Cal. Rptr. at 608. Examples of crimes included murder, rape, robbery, and aiding and abetting intercourse with a minor. The defendant director's conduct was not a crime "independent of and totally apart from" the payment to the actors and actresses.

In a clear victory for those producing sexually explicit films, the court concluded that the defendant director's "speech" was protected by the first amendment. In the future, prosecutors will not be able to attempt similar "end runs" around the first amendment and the obscenity laws. Unfortunately, prosecutors must now rely solely on the unpredictable and confusing obscenity laws in order to prevent productions exhibiting sexually explicit conduct. Those who will benefit most from the confusion and unpredictability of the obscenity laws will be those involved in the production of such works.

MICHAEL J. GAINER

D. *Charges alleging kidnapping for purposes of rape must be pled and proven before a three-year enhancement of sentence may be imposed:* **People v. Hernandez.**

In *People v. Hernandez*, 46 Cal. 3d 194, 757 P. 2d 1013, 249 Cal. Rptr. 850 (1988), the supreme court held that a charge alleging kidnapping for purposes of rape must be pled and proven before an enhancement may be imposed under section 667.8 of the Penal Code. Section 667.8(a) states that "any person convicted of a felony violation of section 261, 264.1, 288a or 289 who, *for the purposes of committing that sexual offense*, kidnapped the victim in violation of Section 207, shall be punished by an additional term of three years." CAL. PENAL CODE § 667.8(a) (West 1988) (emphasis added). Although not expressly stated in the statute, a pleading and proof requirement was implied from the statutory language and held to be necessary to the defendant's due process rights.

The defendant was convicted of rape, assault and kidnapping. Evidence indicated that the defendant was intoxicated at the time of the incident. At trial, section 667.8(a) was neither pled nor proven by the prosecutor. It was not until the probation report that the three-year enhancement of section 667.8(a) was first introduced. At issue on ap-

peal was whether the three-year enhancement may be imposed under section 667.8(a) when a violation of that statute was neither pled nor proven at trial. The court of appeal found no express requirement that section 667.8 be pled and proven and therefore held that the additional term may be imposed.

To resolve the interpretation of section 667.8(a), the court examined the statutory languge. Section 667.8 states that the kidnapping must be "for the purpose of" committing one of the specified sex offenses. CAL. PENAL CODE § 667.8(a) (West 1988). The court noted that a statute requiring the defendant to act "for the purpose of" achieving some futher end actually requires proof of a specific intent. *See People v. Hood*, 1 Cal. 3d 444, 457, 462 P.2d 370, 378, 82 Cal. Rptr. 618, 626 (1969). Thus, the court held that section 667.8 must be pled, and that the defendant's specific intent be proven before the enhancement may be imposed.

The court rejected the prosecutor's argument that section 667.8 is a sentencing fact. *See* CAL. R. CT. 421(b)(3) (West 1988). Since proof of specific intent is required at trial, the court held that section 667.8 is not a mere sentencing consideration for the judge.

The defendant argued that since section 667.8 is a substantive offense, not an enhancement, his conviction under that statute was improper as it was neither pled nor proven. *See People v. Lohbauer*, 29 Cal. 3d 364, 368, 627 P.2d 183, 184, 173 Cal. Rptr. 453, 454 (1981). The court rejected this argument. Had a violation of the statute been a substantive offense, one of the three felony punishments would have been specified: a year-and-a-day sentence, life imprisonment, or death. *See* CAL. PENAL CODE § 1170(a)(2) (West 1988); CAL. R. CT. 405(b) (1988). Since "an additional term of three years" is specified in the statute, but the three felony punishments are not, the court held that section 667.8 is an enhancement, not a substantive crime.

Finally, the court pointed out that requiring that section 667.8 be pled and proven before imposing the enhancement will eliminate due process problems. Due process requires that the defendant be advised of the charges against him so that an adequate defense may be prepared. *See People v. Thomas*, 43 Cal. 3d 818, 823, 740 P.2d 419, 421, 239 Cal. Rptr. 307, 309 (1987); *Lohbauer*, 29 Cal. 3d at 369-70, 627 P.2d at 185, 173 Cal. Rptr. at 455. If the defendant had been advised of the section 667.8(a) charge before trial, he could have introduced evidence of voluntary intoxication as a defense to the specific intent requirement under section 667.8. Since he was not advised of the charge he was effectively denied an opportunity to prepare a defense. The denial of this opportunity was violative of the defendant's right to due process. The court held that failure to plead and prove section 667.8(a) before imposing the enhancement was reversible error.

Pleading and proof of section 667.8(a) is therefore required before its three-year sentence enhancement may be imposed. Although not expressly stated, such a requirement is implied from the statutory language and the right to due process. In its analysis, the court held that section 667.8 is an enhancement, not a substantive offense or a mere sentencing fact. Finally, the court noted that requiring the statute to be pled and proven will give defendants an opportunity to prepare an adequate defense, consistent with their right to due process.

BRYAN HANCE

E. *Where a defendant is convicted of multiple felonies, section 667.6(c) of the Penal Code gives a sentencing court discretion to impose a full consecutive term for the conviction of any sex offense enumerated in section 667.6(c) even if the defendant has been convicted of only one of the offenses:* **People v. Jones.**

In *People v. Jones*, 46 Cal. 3d 585, 758 P.2d 1165, 250 Cal. Rptr. 635 (1988), the supreme court held that where a defendant has been convicted of multiple felonies, section 667.6(c) of the Penal Code gives courts the authority to impose a full consecutive term for the conviction of any sex offense enumerated in subdivision (c), even if the defendant has been convicted of only one of the enumerated sex offenses (ESO). *See* CAL. PENAL CODE § 667.6(c) (West 1988). This holding overturned California appellate court decisions, which held that section 667.6(c)'s consecutive sentencing provision only applied where a defendant had been convicted of more than one ESO. *See, e.g., People v. Waite*, 146 Cal. App. 3d 585, 192 Cal. Rptr. 245 (1983).

The court also held that the 1982 amendment to section 707.2 of the Welfare and Institutions Code broadened the sentencing court's discretion to impose a state prison term upon defendants who were minors at the time of the offense, notwithstanding a positive Youth Authority (YA) determination that the defendants were amenable to YA commitment. *See* CAL. WELF. & INST. CODE § 707.2 (West 1984 & Supp. 1989).

In *Jones*, a juvenile defendant raped a woman during the burglary of her house. The court sentenced him to two consecutive sentences, one for the robbery and another, pursuant to section 667.6(c) of the Penal Code for the rape. The court decided that Jones must serve his seventeen-year sentence in a state prison even though the YA had determined that he was amenable to YA commitment. The defend-

ant contended that since he had been convicted of a single sex conviction, the court had erred in giving him a consecutive sentence pursuant to section 667.6(c), which in his opinion only applied to the conviction for multiple ESO's.

Section 667.6(c) gives the court discretion to impose multiple sentences consecutively or concurrently. 22 CAL. JUR. 3D *Criminal Law* § 3414 (1985 & Supp. 1988). Section 667.6(c) states:

> In lieu of the term provided in section 1170.1 [sentencing terms for two or more felony convictions], a full, separate, and consecutive term may be imposed for each violation of subdivision (2) or (3) of Section 261 [rape], Section 264.1 [rape while acting in concert with another person], . . . Section 289 [penetration of genital or anal opening by foreign object], or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or . . . whether or not the crimes were committed during a single transaction.

CAL. PENAL CODE § 667.6(c) (West 1988 & Supp. 1989). The defendant contended that section 667.6(c)'s reference to "the crimes," as well as a comparison with the terms used in section 667.6(d) makes subdivision (c) inapplicable when only one of the multiple crimes is an ESO. *See* CAL. PENAL CODE 667.6(d) (West 1988 & Supp. 1989).

Regarding the word "crimes" in subdivision (c), the court stated that in accordance with section 7 of the Penal Code, "the singular number includes the plural, and the plural the singular" and that under this rule of construction, the plural word "crimes" must be interpreted to be consistent with the singular phrase "each violation" that appears earlier in the provision. *See* CAL. PENAL CODE § 7 (West 1988); *see also People v. Jamison*, 150 Cal. App. 3d 1167, 1175, 198 Cal. Rptr. 407, 412 (1984). Thus the legislature did not intend to restrict the operation of 667.6(c) to cases in which a defendant has been convicted of two or more ESO's. *See* 73 AM. JUR. 2D *Statutes* § 300 (1974 & Supp. 1988).

The defendant argued that the use of the plural word "crimes" in both subdivisions (c) and (d) implied that subdivision (c) was limited to multiple ESOs. Subdivision (d) immediately follows subdivision (c) and states "[a] full, separate and consecutive term *shall* be served for each violation of [those crimes listed in sub. (c)] . . . . if the *crimes* involve separate victims or involve the same victim on separate occasions." CAL. PENAL CODE § 667.6(d) (West 1988 & Supp. 1989) (emphasis added). The defendant argued that since subdivision (d) applied only to multiple ESOs and the word "crimes" appears in both subdivisions, the word "crimes" must also apply to multiple ESOs in subdivision (c).

The court held, however, that such an interpretation was incorrect; no rule of law required the same meaning be attached to a word throughout a statute—especially when the same word may have a different meaning to effectuate the intention of the act. To buttress its

conclusion, the court stated that subdivision (c) was discriminatory where an ESO was involved with other crimes, whereas subdivision (d) made it mandatory upon the courts to impose consecutive sentences where two or more ESOs were involved. The court reasoned therefore that the difference between legislatively granted discretionary and mandatory sentencing suggested that the word "crimes" in subdivisions (c) and (d) had different meanings.

The defendant also argued that the court abused its discretion in sentencing him to state prison. He argued that since he was a minor at the time of the crime and had been evaluated to be amenable to YA training and treatment; therefore he contended that the court abused its discretion in failing to give the YA recommendation proper weight when it sentenced him to state prison. *See* 2 B. WITKIN, CALIFORNIA CRIMES, *Punishment for Crimes* § 925 (Supp. 1985). To fortify his argument, the defendant cited *People v. Carl B.*, 24 Cal. 3d 212, 219, 594 P.2d 14, 18, 155 Cal. Rptr. 189, 193 (1979), which determined that a trial court had abused its discretion under section 707.2 of the Welfare and Institutions Code in not giving proper weight to a YA recommendation during sentencing. The court found *Carl B.* was not controlling since 707.2 had been amended in 1982 to broaden the court's discretion in committing defendants to a state prison despite a positive YA commitment recommendation. *See* CAL. WELF. & INST. CODE § 707.2 (West 1984 & Supp. 1989).

The court found that the need to protect society, the seriousness of the offenses, and the interests of justice outweighed the defendant's ammenability to YA commitment. The court's arguments that section 667.6(c) is unambiguous cannot hide the fact there is a sharp division in appellate decisions. Such evidence provides adequate proof that section 667.6(c) is at least susceptible to more than one interpretation. Therefore, the construction most favorable to the defendant should be adopted until the legislature clarifies the statute.

DANIEL RHODES

F. *A jury may consider lesser offenses at any point in its deliberation but may not return a verdict on a lesser included offense unless the defendant is found not guilty of the greater crime charged:* **People v. Kurtzman.**

In *People v. Kurtzman*, 46 Cal. 3d 322, 758 P.2d 572, 250 Cal. Rptr. 244 (1988), the supreme court clarified the holding of *Stone v. Supe-*

rior Court, 31 Cal. 3d 503, 646 P.2d 809, 183 Cal. Rptr. 647 (1982), which established guidelines for instructing juries on greater and lesser included offenses. The court concluded that *Stone* simply restricts a jury from returning a verdict on a lesser included offense before acquitting a defendant on the greater crime charged. The court determined that *Stone* does not preclude a jury from considering lesser offenses before it has returned a verdict on the greater offense. *See* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Trial* § 480 (1963 & Supp. 1985); 21 CAL. JUR. 3D *Criminal Law* § 3067 (1985 & Supp. 1988).

The trial court instructed the jury that if it were not convinced beyond a reasonable doubt that the defendant was guilty of first degree murder it could convict him of a lesser included offense. *See* CALIFORNIA JURY INSTRUCTIONS *Criminal* (CALJIC) No. 17.10 (5th ed. 1988); *see also* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 478, 480 (1963 & Supp. 1985). After three days of deliberation, the jury failed to reach agreement on the first degree murder charge, but agreed on manslaughter. The judge then told them to unanimously agree on the first degree murder charge. *See* CALJIC No. 8.75 (Supp. 1987) (jury instructions which help jurors delineate sequence of deliberations in homicide cases). They returned a verdict of not guilty of first degree mudrer. *See generally* 75 AM. JUR. 2D *Trial* §§ 573-74 (1974 & Supp. 1988); 21 CAL. JUR. 3D *Criminal Law* § 3053 (1985).

The jury was then instructed to deliberate on the issue of second degree murder. During their considerations, the jury asked the judge whether they could find the defendant guilty of manslaughter without first unanimously finding him not guilty of second degree murder. The judge answered that under *Stone*, the jury had to unanimously agree on the second degree murder charge before considering the lesser offense of manslaughter. The jury found the defendant guilty of second degree murder. The defendant appealed contending that the instructions interfered with the jury's deliberations and coerced it into entering the guilty verdict on the second degree murder charge. *See* 59 CAL. JUR. 3D *Trial* § 102 (1980 & Supp. 1988).

In *Stone*, the court held that a "trial court is constitutionally obligated to afford the jury an opportunity to render a partial verdict of aquittal on a greater offense when the jury is deadlocked only on an uncharged lesser included offense." *Stone v. Superior Court*, 31 Cal. 3d 503, 519, 646 P.2d 809, 820, 183 Cal. Rptr. 647, 658 (1982). The court suggested that a number of judicially declared rules of criminal procedure could be used to help a jury reach a verdict on greater and lesser included offenses. The court reiterated, however, that regardless which procedure was used, "the jury must be cautioned . . . that

it should first decide whether the defendant is guilty of the greater offense before considering the lesser offense, or if it is unable to agree on that offense, it should not return a verdict on the lesser offense." *Id.*

The court noted that the instructions given in the instant case were indicative of the overly-broad interpretation given to *Stone*. The court stated that while *Stone* had led to some confusion in the past, its overall import "is simply that the jury must acquit of the greater offense before returning a verdict on the lesser included offense, and no further control of the sequence of jury deliberations was intended." *Kurtzman*, 46 Cal. 3d at 330-31, 759 P.2d at 577, 250 Cal. Rptr. at 249.

To support its conclusion, the court stated that its interpretation of *Stone* was consistent with the fact that *Stone* also allowed a trial court the alternative of not giving the jury any instructions unless it appeared that a deadlock was developing. Therefore, juries which were given no sequence of deliberation could structure their considerations in any order they chose. Consequently, the court noted, it would be arbitrary if one jury had to follow a strict pattern of considering offenses and another jury did not simply because a judge anticipated a deadlock.

The court concluded with interpreting *Stone* as representing an appropriate balancing of interests: protected the defendant's interest in not having unduly restricted jury deliberations and also to protect the state's interest in requiring the jury to return a verdict on the greater offense first. Finally, the court bolstered its argument by noting that its interpretations of *Stone* had also been adopted by other courts of appeal in the state. *See People v. Campbell*, 193 Cal. App. 3d 1653, 1573, 239 Cal. Rptr. 214, 226 (1987); *People v. Gibson*, 195 Cal. App. 3d 841, 848, 241 Cal. Rptr. 126, 130 (1987). Although the trial court misapplied *Stone*, the court found the error harmless since the jury had in fact discussed the lesser offenses while deliberating on the second degree murder charge. *See* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 492 (1963 & Supp. 1985). The court therefore affirmed the defendant's conviction.

As the court noted, *Kurtzman* was an "inevitable successor" to *Stone*. *Kurtzman*, 46 Cal. 3d at 328, 758 P.2d at 756, 250 Cal. Rptr. at 248. While *Stone* addressed the situation when a jury was unanimous on the greater offense but undecided on the lesser, there was much confusion as to the proper procedure when there was jury disagreement on the greater offense. *Kurtzman* clarified the appropriate pro-

cedure to be followed in these situations while still allowing the jury to have as much freedom as possible during the deliberation of a homicide verdict.

DANIEL RHODES

V. FEDERALISM

The federal regulatory scheme governing fishing on Indian reservations preempts state power to prosecute tribal fishermen who violate state fishing regulations: **Mattz v. Superior Court.**

In *Mattz v. Superior Court*, 46 Cal. 3d 355, 758 P.2d 606, 250 Cal. Rptr. 278 (1988), the supreme court issued a peremptory writ to prohibit the state from prosecuting tribal fishermen under state law. In doing so, the court relied upon its decision in *People v. McCovey*, 36 Cal. 3d 517, 685 P.2d 687, 205 Cal. Rptr. 643 (1984). In *McCovey*, the court held that the comprehensive federal regulation of Indian fishing rights on the Hoopa Valley Indian Reservation (the Reservation) preempts the state from criminally prosecuting Yurok Indians for alleged violations of commercial fishing statutes. *See* CAL. FISH & GAME CODE §§ 8434, 8685.6 (West 1984 & Supp. 1989); *see also* 34 CAL. JUR. 3D *Fish & Game* § 40 (1977 & Supp. 1988).

In the present case, defendants, all Yurok Indians who lived on the Reservation, were charged with violating and conspiring to violate certain provisions of the Fish & Game Code. *See* CAL. FISH & GAME CODE §§ 8434, 8685.6 (West 1984 & Supp. 1989); CAL. PENAL CODE § 182 (West 1977 & Supp. 1989). These provisions prohibit the sale of fish taken from the Klamath River, and the sale or possession for sale of any salmon, steelhead, or striped bass, taken from California waters with the use of a gill net. *See* WEBSTER'S INTERNATIONAL DICTIONARY 957 (3d ed. 1971) (defining gill net)).

After an extensive description of the Reservation and its growth, the court concluded that the defendants, at the time of the alleged violation, were fishing on the Reservation. The court then stated the purpose of the federal regulatory scheme relating to the Reservation: "to protect the fishery resources and to establish procedures for the exercise of the fishing rights of Indians of the Reservation . . . . The regulations are intended to promote reasonably equal access to the fishery resources of the Reservation by all Indians of the Reservation and to assure adequate spawning escapement." 25 C.F.R. § 250.1(a) (1988). After noting the detail and comprehensiveness of the federal scheme, the court concluded that exercise of state criminal jurisdiction in this area would disrupt the federal scheme. The court dismissed the concept of concurrent state court jurisdiction dubbing it

an incompatible system. *See* CAL. JUR. 3D *Indians* §§ 6-8 (1977 & Supp. 1988).

The court then addressed the appellate court's mistake in distinguishing *McCovey* with the instant case. The court of appeal's reasoned that *McCovey* was not controlling because the salmon population in the Klamath River had declined since *McCovey* to such an extent as to be classified as an endangered species, thus legitimizing concurrent state jurisdiction over the threatened resource. Despite the declining salmon population, the supreme court determined that *McCovey* controlled for two reasons. First, even if the salmon population had dwindled since *McCovey* to such an extent to justify concurrent state jurisdiction, such rationale could not sustain criminal charges based on conduct which occurred three years prior to *McCovey*. Second, the court decided that a mere decline in the salmon population alone would not create concurrent jurisdiction given the comprehensive nature of the federal regulations.

The court discarded the appellate court's suggestion that the *McCovey* decision did not apply due to the fact that a majority of the Klamath River salmon are hatched outside the reservation and that as to these fish, state jurisdiction would apply. The court asserted that the majority in *McCovey* was cognizant of the fact that many of the Reservation's salmon spawned outside of the Reservation.

Finally, the court rejected the People's claim that newly discovered historical documents revealed that the Yurok Indians enjoyed no federally protected fishing rights in the Klamath River; that is, California statehood in 1850 caused title of the Klamath River to pass from the federal government to the state, thus making the 1891 creation of the Reservation by the government invalid. The court answered this by stating that such a claim flew in the face of every recent decision involving Yurok Indians in the Reservation area.

Additionally, the People's contention failed substantively. The court held that the federal government in 1891 did not have the power to reserve fishing rights in the Klamath River through its power "to regulate the navagable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution." *Mattz*, 46 Cal. 3d at 372, 758 P.2d at 617, 250 Cal. Rptr. at 289.

The court thus reinforces the federal regulation of tribal reservations. Nevertheless, the decision should not be interpreted to mean that a state can never act to protect scarce resources on Indian reservations, as the majority implies that concurrent state jurisdiction

might be permissible where federal government or tribal authorities fail to protect the resource through preventative measures.

JOHN AUGUSTINE SOPUCH III

VI. GOVERNMENT

In determining allowable off-duty activities for police officers, section 1126 of the Government Code contains examples of prohibited activity but is not an exhaustive list: **Long Beach Police Association v. City of Long Beach.**

In *Long Beach Police Officers Association v. City of Long Beach*, 46 Cal. 3d 736, 759 P.2d 504, 250 Cal. Rptr. 869 (1988), the supreme court held that section 1126 of the Government Code confers upon a local agency the power to prevent a police officer from being collaterally employed in any field that is incompatible with his or her official duties. Moreover, the court viewed the four activities specifically enumerated in section 1126 as mere examples and not an exhaustive list of prohibited conduct. *See* CAL. GOV'T CODE § 1126 (West 1980 & Supp. 1989); *see generally* 63A AM. JUR. 2D *Public Officers and Employees* §§ 78-81 (1984); 52 CAL. JUR. 3D *Public Officials* § 174 (1979 & Supp. 1988).

Police officer Russell Peterson, filed a request for collateral employment to work as a cvil process server which the Long Beach Police Department denied. Peterson filed a grievance with the Department and claimed that their denial of a collateral employment permit violated section 1126. He contended that the Department could not deny an officer a collateral employment permit unless the officer sought to engage in one of the four types of activities proscribed by section 1126. *See* CAL. GOV'T CODE § 1126(b) (West 1980 & Supp. 1989) ((1) using police time, equipment, badge, uniform or influence for personal gain; (2) receiving money for performing an act required in officer's regular couse of duties; (3) performing an act later subject to review by police department; (4) acts which involve time demands affecting performance of official duties). Peterson claimed that being a process server was not within the act's prohibitions. The hearing officer ruled that the Department properly denied the application. Peterson and the Long Beach Police Officers Association (the Association) filed a petition for a writ of mandate, claiming that section 1126 was intended to be an exhaustive list of prohibited activities. At trial, the city conceded that employment as a civil process server was not within any of the four enumerated categories set forth in section 1126. Nevertheless, the city alleged that these subsections were merely examples of proscribed activities and did not constitute an exclusive list. The trial court denied the Association's

petition, finding that the Department enjoyed discretion to determine allowable off-duty activities. The court of appeal reversed.

To resolve this tension, the supreme court turned to the language of section 1126. The court found section 1126(a) to be a sweeping proscription against any activity incompatible with an officer's official duties, but viewed section 1126(b) as conferring full discretion upon the local appointing power to determine and regulate the activities it deemed incompatible. Because the court found the meaning of section 1126 less than axiomatic using this approach, it chose to ascertain the correct statutory interpretation by analyzing the legislative history of section 1126.

The court found section 1126 to be modeled after section 19251 of the Government Code (now section 19990 after recodification in 1981) which addresses the collateral employment of state officers and employees. *See* CAL. GOV'T CODE § 19990 (West Supp. 1989); *see generally* 52 CAL. JUR. 3D *Public Officers* § 147 (1979 & Supp. 1988). The court noted that although sections 19251 and 1126 contained virtually identical terminology and enumerated the same four prohibited activities, there existed a schism regarding the agency's authority to determine what constituted an incompatible activity. The language of section 19251 stated that the appointing power shall give consideration to the four enumerated activities when determining incompatibility. The court viewed this language as not limiting the state agency's prohibition power concerning off-duty employment. The court then pointed out that in 1986, section 19251 was recodified as section 19990; at that time, the language pertaining to a state agency's authority to define proscriptive activities was amended. *See* CAL. GOV'T CODE § 19990 (West Supp. 1989); *see generally* 67 C.J.S. *Officers and Public Employees* § 32 (1978). The court found the new language left no question that the legislature intended to illustrate, not exhaust, the types of incompatible off-duty activities.

The court next traced the legislative history of section 1126. The court's investigation revealed that the original version of section 1126 contained exactly the same language as section 19251. However, when section 1126 emerged from the Senate Committee on Local Government, the phrase dealing with the local agency's power to define incompatible activities had been altered. The amended version of section 1126 required that a local agency must prohibit the activities mentioned in the statute, not merely consider them when determining the incompatibility of off-duty employment. This amendment changed the incompatible activities listed in section 1126(b) from dis-

cretionary guidelines to minimum standards. However, the court found that the true purpose of the amendment was to bolster the statute by setting minimum standards for local agencies to follow, while also leaving them free to delineate additional standards at their discretion. After senate approval of the amendment, the assembly in turn modified section 1126 to prevent the establishment of minimum standards. When it was finally enacted, the language of section 1126(b) was essentially the same as that in section 19251, the section it was modeled after in the first place. Therefore, the final modification was found determinative of the legislature's intention to view the enumerated activities in section 1126(b) as a guide and not to constrain a local agency's exercise of discretion.

In sum, although the court meticulously recounted the legislative history of both section 19251 and section 1126, attempting to display certain parallels, in the end it based its decision on the fundamental principle of *in pari materia*—"statutes upon the same matter or subject . . . are to be construed together." BLACK'S LAW DICTIONARY 711 (5th ed. 1979). By conferring a wide range of discretion upon a local agency, the court not only deferred to the agency's expertise to define incompatible activities of off-duty employees, but it also lightened its own docket by legitimizing yet another forum for the resolution of disputes.

JOHN AUGUSTINE SOPUCH III

VII. LEGISLATURE

The Legislature may instruct a state agency to carry out a state statute that is not in conflict with federal law: **Reese v. Kizer.**

In *Reese v. Kizer*, 46 Cal. 3d 996, 760 P.2d 495, 251 Cal. Rptr. 299 (1988), the supreme court held that "the Legislature may direct an administrative agency . . . to implement a statute to the extent it does not conflict with federal law." *Id.* at 997-98, 760 P.2d at 496, 251 Cal. Rptr. at 299. Thus, consistent with article III, section 3.5(c) of the California Constitution, authority was given to the Department of Health Services (the Department) to implement a section of the Welfare and Institutions Code to the extent that it did not conflict with federal law. *See generally* CAL. CONST. art. III, § 3.5(c) ("An administrative agency . . . has no power: . . . (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute . . . ."). *See also* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 57 (9th ed. 1987); 1 AM JUR. 2D *Administrative Law* § 123 (1962); 2 CAL. JUR. 3D *Administrative Law* § 73 (1979).

In the present case, the Legislature had empowered the Department to implement section 14005.16 of the Welfare and Institutions Code to the extent it did not conflict with federal law. *See generally* CAL. WELF. & INST. CODE § 14005.16 (West Supp. 1989) (a provision of the Medi-Cal Act, providing that only community property is "available" as income in determining eligibility for benefits to married persons in nursing homes). The Department determined that the statute conflicted with federal law and refused to implement it. A class action was then instituted demanding the implementation of section 14005.16.

The prevailing practice at the federal level was to consider *all* income received in the institutionalized person's name when the issue of eligibility was at stake. *See* 42 U.S.C. § 1396 (1985 & Supp. IV 1986). Under section 14005.16, only the institutionalized spouse's share of the community property interest in the combined income of the couple was to be considered in determining eligibility. The rationale behind the Department's refusal to implement section 14005.16 was the fear of losing federal funds. Medi-Cal is a joint federal-state program and in order to assure the availability of federal funds, the state must operate within the guidelines imposed by federal statutes and regulations. As a safety valve, section 14005.16 contained uncodified provisions giving the Department the authority to avoid conflict with federal law. The provisions allowed the Department to seek federal waivers if a conflict arose putting the federal funding in jeopardy of being lost. *See* 1983 Cal. Stat. ch. 1031, § 2(c) (section 2).

Concerned over the possible conflict between section 14005.16 and 42 U.S.C. § 1396, the director of the Department applied for a waiver of federal regulations governing the treatment of institutionalized individuals' income for determining benefit eligibiity. The request for waiver was denied. As a result, section 14005.16 was not implemented.

In reversing the lower courts' decisions, the supreme court disagreed with the court of appeal's conclusion that section 2 was *void ab initio* because it instructed an agency to perform an act expressly forbidden by the California Constitution. *See* CAL. CONST. art. III, § 3.5(c). The court pointed out that section 2 did not give an administrative agency power to independently determine that section 14005.16 conflicted with federal law, but rather directed the agency to effectuate section 14005.16 to the fullest extent permissible under federal law as determined by the appropriate federal agencies.

Therefore, the court refused to find section 2 and thus section 14005.16 adverse to any state constitutional provision.

The court then stated that section 3.5 of article III was enacted to prevent agencies from frustrating the mandates of the legislature by stripping them of any interpretive power. *See* CAL. CONST. art. III, § 3.5. The court did not perceive provisions like section 2 as returning this authority to the agencies. Rather, allowing an agency to limit the interpretation of a statute so that it is in accord with federal regulations achieves precisely what the legislature intended.

The court concluded that without provisions like section 2 of 14005.16 allowing an agency to seek federal waivers, the Legislature could not assure the statute's validity and concurrently guarantee the full effectuation of the statute's underlying policy.

By reaching this decision, the court has done exactly what it said it was not doing—returning to the agencies the power to interpret statutes to decide whether to implement them, and the extent of their implementation. The court attempts to distinguish between not allowing an agency to independently interpret a statute and permitting an agency to effectuate a statute's maximum permissible extent. This distinction is esoteric; the court's decision bestows upon an agency some form of discretionary power. This conferment is exactly what section 3.5 of article III was designed to prevent.

JOHN AUGUSTINE SOPUCH III

VIII. TORTS

A. *An unmarried cohabitant may not recover for negligent infliction of emotional distress or loss of consortium, even if the relationship was comparable to a marriage:* **Eldon v. Sheldon.**

In *Eldon v. Sheldon*, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988), the supreme court held that a cohabitant witnessing the death of the other cohabitant failed to state a cause of action for either negligent infliction of emotional distress or loss of consortium. The court reached this decision despite the alleged stability and marriage-like qualities of the cohabitants' relationship. In its analysis, the court emphasized the state's interests in protecting the marital relationship and limiting the scope of the defendant's liability. Additionally, the court noted the difficulty in determining the strength of the cohabitants' relationship.

The plaintiff and the decedent, unmarried cohabitants, were involved in a car accident with the defendant. The plaintiff, a passenger in the decedent's car, witnessed the decedent's fatal injuries. The plaintiff alleged that the defendant was negligent in causing the acci-

dent. He sought recovery for his own injuries, for loss of consortium and for negligent infliction of emotional distress from witnessessing the decedent's death. The trial court sustained a demurrer to the latter two causes of action because the plaintiff and the decedent were not married when the accident occurred.

The court addressed the negligent infliction of emotional distress claim in light of its holding in *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), that absent overriding policy considerations, a bystander could recover for negligent infliction of emotional distress from witnessing another's injuries. *See id.*, at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81. *See* 38 AM. JUR. 2D *Fright, Shock and Mental Disturbance* § 36 (1968 & Supp. 1988); 46 CAL. JUR. 3D *Negligence* § 76 (1978 & Supp. 1988); Annotation, *Relationship Between Victim and Plaintiff-Witness as Affecting Right to Recover Damages in Negligence for Shock or Mental Anguish at Witnessing Victim's Injury or Death*, 94 A.L.R. 3D 486 (1979); Annotation, *Right to Recover Damages in Negligence for Fear of Injury to Another, or Shock or Mental Anguish at Witnessing Such Injury*, 29 A.L.R. 3RD 1337 (1970). Recovery was contingent, however, upon proof that the risk was foreseeable. *Dillon*, 68 Cal. 2d at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81. The test for foreseeability is whether the plaintiff: (1) was near the scene of the accident, (2) contemporaneously observed the accident, and (3) was closely related to the victim. *Id.* Only the third element was at issue in *Eldon v. Sheldon.*

The plaintiff contended that the closely related requirement was met as the relationship in this case was stable, meaningful, and comparable to that of a marriage. Because of the increase in unmarried cohabitants, plaintiff contended that it was foreseeable that two unmarried cohabitants would occupy the same car. *Cf. Marvin v. Marvin*, 18 Cal. 3d 660, 665 n.1, 557 P.2d 106, 110, n.1, 134 Cal. Rptr. 815, 819 n.1 (1976); Meade, *Consortium Rights of the Unmarried: Time for Reappraisal*, 15 FAM. L.Q. 223, 224 n.6 (1981).

The court rejected this argument, however, based on three overriding policy considerations. The court's first consideration was the need to limit the scope of a negligent defendant's liability. Allowing unmarried cohabitants to recover in cases such as this would unduly burden society with an increase in lawsuits and frivolous claims. *See Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 448, 563 P.2d 858, 865, 138 Cal. Rptr. 302, 309 (1977); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 932 (5th ed. 1984); Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compen-*

sating Bystanders and Relatives for Intangible Injuries, 35 HASTINGS L.J. 477, 483-87 (1984); Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1522-23 (1985).

The second policy consideration for denying recovery was to avoid over-burdening the courts. Determining whether a relationship is parallel to marriage would be time consuming, intrusive, and arbitrary. *See Norman v. Unemployment Ins. Appeals Bd.*, 34 Cal. 3d 1, 8-10, 663 P.2d 904, 908-10, 192 Cal. Rptr. 134, 138-40 (1983).

The court's final policy consideration was the strong state interest in promoting the marital relationship. The court reasoned that elevating unmarried cohabitants to the level of a marital relationship would seriously impede that interest. *See Neito v. City of Los Angeles*, 138 Cal. App. 3d 464, 470-71, 188 Cal. Rptr. 31, 34 (1982). The court added that this policy was based not on morality, but rather on the need to distinguish between the rights and responsibilities of married and unmarried persons in society. *See Laws v. Griep*, 332 N.W.2d 339, 341 (Iowa 1983).

The court also rejected the plaintiff's claim for loss of consortium. Courts have allowed recovery under such a theory only when a marital relationship has existed. *See, e.g., Ledger v. Tippitt*, 164 Cal. App. 3d 625, 633, 210 Cal. Rptr. 814, 817 (1985); *Leiding v. Commercial Diving Center*, 143 Cal. App. 3d 72, 76, 191 Cal. Rptr. 559, 562 (1983). Since the plaintiff and the decedent never married, the court held that the plaintiff failed to state a cause of action for loss of consortium. The court added that the three policy considerations discussed for negligent infliction of emotional distress also apply to claims for loss of consortium.

The court thus narrowed the scope of a defendant's liability regarding claims for negligent infliction of emotional distress and loss of consortium. An unmarried cohabitant who witnessed the death of the other cohabitant may not recover under either of these theories. Attempting to promote marriage, as well as protect society and the judiciary from a flood of litigation, the court further refined a line in the law of negligence which is rapidly growing brighter.

BRYAN HANCE

B. *The Unfair Practices Act does not provide third-party claimants a private right of action against insurers for unfair settlement practices. For actions pending under the now overruled Royal Globe decision, a final judgment determining liability is required prior to any settlement:* **Moradi-Shalal v. Fireman's Fund Insurance Companies.**

In *Moradi-Shalal v. Fireman's Fund Insurance Companies*, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988), the supreme court held that the Unfair Practices Act (the Act) does not provide third-party claimants a private right of action against insurers for unfair settlement practices. *See* CAL. INS. CODE §§ 790-790.10 (West 1972 & Supp. 1989). The court thus overruled *Royal Globe Insurance Co. v. Superior Court*, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979). *See* California Practicum, *The Overruling of Royal Globe: A "Royal Bonanza" for Insurance Companies, But What Happens Now?*, 16 PEPPERDINE L. REV. 763 (1989). The *Moradi-Shalal* decision, however, only applies prospectively.

For those cases pending under the *Royal Globe* decision, the court held that a final judgment determining the insured's liability is required before an action for statutory bad faith may be presented. Moreover, this determination must be made prior to any settlement. Litigants are thus no longer able to settle with each other before suing the insurer for violations of section 790.03 of the Insurance Code.

The plaintiff and an insured of the defendant were involved in an auto accident caused by the insured's negligence. The plaintiff twice attempted to settle within a five-month period by writing to the defendant. Finally, after the plaintiff filed suit against the insured, a settlement was reached and the action was dismissed with prejudice. The plaintiff then sued the defendant insurer under *Royal Globe*, alleging statutory bad faith in refusing to promptly and equitablly settle the claim. The trial court held that the absence of a conclusive judicial determination of the insured's liability in the first suit prevented recovery in the subsequent action. The court of appeal reversed, holding that a settlement and subsequent dismissal with prejudice was adequately conclusive. The issue before the court, therefore, was whether a conclusive judicial determination of the insured's liability is required before the insurer may be sued under the Act.

To resolve this issue the court re-examined its opinion in *Royal*

Globe. The *Royal Globe* court held that a private right of action is available under section 790.03 of the Insurance Code and that insureds and third-party claimants injured by insureds could sue the insurer for unfair practices or "bad faith." *Royal Globe*, 23 Cal. 3d at 884-88, 592 P.2d at 332-34, 153 Cal. Rptr. at 845-47. In addition, this suit could be based upon a single instance of insurer misconduct. *Id.* at 891, 592 P.2d at 336, 153 Cal. Rptr. at 849. Finally, the court held that a third-party claimant must await the conclusion of the action against the insured before suing the insurer. *Id.* at 891-92, 592 P.2d at 336-37, 153 Cal. Rptr. at 849-50.

The *Moradi-Shalal* court studied the aftermath of the *Royal Globe* decision. First the court noted that the majority of courts in other states rejected *Royal Globe* opinion. *See, e.g., Seeman v. Liberty Mut. Ins. Co.*, 322 N.W.2d 35, 40-43 (Iowa 1982); *Morris v. American Family Mut. Ins. Co.*, 386 N.W.2d 233, 234-38 (Minn. 1986). Second, the court admitted that the *Royal Globe* opinion received considerable scholarly criticism. *See, e.g.,* Allen, *Insurance Bad Faith Law: The Need for Legislative Intervention*, 13 PAC. L.J. 833 (1982); Note, *Extending the Liability of Insurance for Bad Faith Acts: Royal Globe Insurance Company v. Superior Court*, 7 PEPPERDINE L. REV. 777 (1980); Note, *Rodriguez v. Fireman's Fund Insurance Companies, Inc.: An Illustration of the Problems Inherent in the Royal Globe Doctrine,* 15 SW. U.L. REV. 371 (1985).

Third, the court noted that the legislature attempted to overrule the *Royal Globe* holding. The court held that such an attempt, although not conclusive of the matter, was evidence of the legislature's misgivings concerning the *Royal Globe* decision. The court also cited several adverse effects of the decision including: increases in litigation, rising insurance and legal costs, frivolous bad faith claims against insurers, and imprudent settlements. Based upon the foregoing consequences, the court overruled the *Royal Globe*.

The court warned that remedies nevertheless remain to punish insurer misconduct. For example, the insurance commissioner may issue a cease and desist order against the insurer, impose a fine, or suspend the insurer's license. *See* CAL. INS. CODE §§ 790.05-.09 (West 1972 & Supp. 1989). In addition, the courts may adjudicate insurer misconduct under the common law torts of fraud, breach of the implied covenant of good faith and fair dealing, breach of contract, or infliction of emotional distress. Punitive damages may even be imposed against the insurer in some instances. *See* CAL. CIV. CODE § 3294 (West 1972 & Supp. 1989).

Stating that its decision applied prospectively, the court addressed the necessary prerequisites for recovery in those cases pending under *Royal Globe*. First, the court held that neither settling nor admitting

liability is a satisfactory conclusion of the underlying action. A final judicial determination that the insured was actually liable to the third-party claimant is thus required. Moreover, this determination may not be made after the settlement. *See Heninger v. Foremost Ins. Co.*, 175 Cal. App. 3d 830, 834, 221 Cal. Rptr. 303, 305-06 (1985); *National Ins. Co. v. Superior Court*, 128 Cal. App. 3d 711, 714, 180 Cal. Rptr. 464, 466 (1982); *Doser v. Middlesex Mut. Ins. Co.*, 101 Cal. App. 3d 883, 891, 162 Cal. Rptr. 115, 119-20 (1980).

The court mentioned several problems with permitting post-settlement litigation. First, the claimant must still establish the insured's liability in the subsequent action against the insurer. This allows the claimant to sue both the insured and the insurer in the same lawsuit. However, evidence of insurance or the existence of a previous settlement would undoubtedly prejudice the jury's determination of the insured's liability. *See generally* CAL. EVID. CODE § 1152 (West 1966 & Supp. 1989) (evidence of settlement is inadmissible to prove liability on the settled claim). Second, litigation is the very action a settling party seeks to avoid. Third, permitting post-settlement litigation may unjustly allow the claimant to retain the proceeds from both the settlement and the subsequent suit, thereby resulting in a windfall to the claimant. Finally, the insurer's duty to protect the insured's interests may be adversely affected when it is concerned with its own potential liability.

Thus, the court undertook some judicial housekeeping in attempting to rectify the post-*Royal Globe* problems. The *Moradi-Shalal* solution is a victory for insurers as they no longer fear private statutory causes of action, or post-settlement litigation under the Act. Nevertheless, strong administrative sanctions and various judicial remedies in appropriate common law actions are certain to make the insurers think twice about settlement actions.

BRYAN HANCE

C. *An action by a personal injury claimant must not be stayed against an insolvent insurance company if the claimant elects to seek recovery wholly from the insolvent's insurance coverage, and is able to maintain an independent civil action:* Webster v. Superior Court.

In *Webster v. Superior Court*, 46 Cal. 3d 338, 758 P.2d 596, 250 Cal. Rptr. 268 (1988), the supreme court held that under the Insurance

Code, a stay of personal injury actions is not mandated simply because an insurance company is entangled with insolvency proceedings. *See* CAL. INS. CODE §§ 1011, 1016 (West 1972 & Supp. 1989); *see generally* 43 AM. JUR. 2D *Insurance* §§ 88-107 (1982 & Supp. 1988); Annotation, *What Constitutes Insolvency of Insurance Company Justifying State Dissolution Proceedings and the Like*, 17 A.L.R. 4TH 1 (1982); *but see* 39 CAL. JUR. 3D *Insurance Companies* §§ 153, 155, 159 (1977 & Supp. 1988). The court also held that a personal injury claimant must make a binding election to seek recovery from either the insolvent's assets or from the insolvent's insurance coverage. If the claimant seeks recovery wholly from the latter, the court must allow him the maintainance of an independent civil action. If the claimant refuses to make an election or seeks even partial recovery from the insolvent's assets, his personal injury action may be stayed, leaving settlement to the discretion of an insurance commissioner appointed as conservator of the insolvent. *See* CAL. INS. CODE § 1020 (West 1972 & Supp. 1989); *see generally* 39 CAL. JUR. 3D *Insurance Companies* § 153 (1977 & Supp. 1988).

In January 1982, Webster, an employee of Mission Insurance Company, (Mission), which shared offices with Enterprise Insurance Company (Enterprise), lost the use of his only leg after the estranged husband of an Enterprise employee entered the offices with a shotgun and randomly shot Webster. Enterprise carried primary liability coverage of $500,000 from Great American Insurance Company (Great American). In addition, Enterprise had excess coverage from First State Insurance Company. These two insurance companies defended Enterprise.

During the Webster proceeding, the Insurance Commissioner of California (Commissioner) received a court order placing Enterprise under the Commissioner's conservatorship due to insolvency. The order enjoined all actions against Enterprise or the Commissioner.

Webster filed a motion relief from the stay, claiming that any relief awarded would come from Enterprise's insurance coverage and not its assets. The Commissioner and Enterprise argued that if the injunction were lifted, the Commissioner's orderly administration of Enterprise would be thwarted, and Webster would gain an unfair advantage over other claimants.

The lower courts denied Webster's motion but the supreme court reversed and lifted the stay. The supreme court justified this decision on several grounds. First, the court determined that the language of section 1020 of the Insurance Code did not require a permanent stay of Webster's action. *See* CAL. INS. CODE § 1020 (West 1972 & Supp. 1989). The court disagreed with Enterprise's literal interpretation of the phrase, "the court *shall* issue such other injunc-

tions or orders *as may be deemed necessary* to prevent *any* or *all* of the following occurrences [including] . . . the institution or prosecution of any actions or proceedings." *See* CAL. INS. CODE § 1020 (West 1972 & Supp. 1989) (emphasis added). The court pointed out that the adoption of such a rigid definition of this section would spawn direct conflicts with other provisions of the Insurance Code as well as other areas of California law. *See* CAL. INS. CODE § 11580 (West 1972 & Supp. 1988); 39 CAL. JUR. 3D *Insurance Companies* §§ 338, 343, 425-428 (1977 & Supp. 1988); *see also* CAL. LAB. CODE § 5300 (West 1971 & Supp. 1989); 65 CAL. JUR. 3D *Work Injury Compensation* § 227 (1981 & Supp. 1989).

The court further held that to remove a court's discretion in determining the appropriateness of an injunction would conflict with the basic legal principle conferring discretion on the courts when equitable remedies are at issue. The court also stated that forcing a court to require a stay in all cases could prevent the very result that the Insurance Code was designed to achieve—orderly administration of the insolvent.

The court then focused its attention on whether a claimant, in order to avoid a stay of his action, must make a binding election to seek recovery solely from the insolvent's insurance coverage. The court stated that the main purpose of section 1020 of the Insurance Code was to protect the assets of an insolvent insurer for orderly distribution. The court noted that this purpose is met by requiring a claimant to make a binding election either to seek recovery solely from the insolvent's insurance coverage or proceed against the insolvent's assets.

By reaching this decision, the court invaded a realm traditionally occupied by the Commissioner and wrested substantial power from this office—the power to resolve legal disputes involving an insolvent insurance company's insurance coverage. By reducing the Commissioner's authority, the supreme court has streamlined the administration of an insolvent insurance company's assets. The court's decision will expedite the recovery process for personal injury claimants who are willing to seek insurance claims to satisfy their judgments and will increase their odds that these judgement awards will better reflect the actual damages due.

JOHN AUGUSTINE SOPUCH III